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No. 80-990

IN THE

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Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Application for Leave to File Amicus Curiae Brief in Support of Appellees/Plaintiffs and Amicus Curiae Brief.

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JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

Application for Leave to File Amicus Curiae Brief in Support of Appellees/Plaintiffs.

Applicant asks leave of court to file an Amicus Curiae Brief in support of Chavez-Salido, *et al.*

a. Interest of Amicus Curiae.

The Service Employees International Union (SEIU) is an affiliate of the American Federation of Labor/Congress of Industrial Organizations with 700,000 members in the United States and Canada.

Social Services Union, SEIU, Local 535, is a statewide local in California primarily representing government em-

ployees. It represents probation officers in Santa Barbara, Fresno, and Marin counties. Among its past and present members are resident aliens who have been and are now probation officers. These people have a strong personal interest in the outcome of this case. Applicant also represents a number of organized public sector employees who, given the breadth of California Government Code Section 1031(a), California Penal Code Section 830.5 and the attendant additions, could well be brought under the requirements of citizenship, *e.g.*, registered nurses, social workers, clinical psychologists.[1]

The broad, scattered, and seemingly aimless inclusion of assorted, unrelated employment areas could at any time sweep quickly into and encompass jobs which presently are excluded from these statutes.[2]

b. Issues Presented by Applicant.

Applicant union represents the interests and opinions of its probation officer members. Included among these probation officers are resident aliens who could be fired if these statutes are enforced. Their knowledge of the actual job and any corresponding need for citizenship should be included in any assessment of the constitutionality of, and necessity for, the statutes in question.

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[1]Perhaps the only public sector employees represented by SEIU Local 535 who could not be required to be citizens are the attorneys who work as public defenders. *In re Griffiths*, 413 U.S. 717 (1973).

[2]There are about seventy occupational categories designated as "peace officers" thereby requiring citizenship under Cal. Govt. Code §1031(a). Among them are: employees of the State Department of Parks and Recreation, Cal. Penal Code §830.2(h); Volunteer Fire Wardens, Cal. Penal Code §830.3(c); Park Rangers, Cal. Penal Code §830.3(b); Investigators for the Board of Dental Examiners, Cal. Penal Code §830.3(c).

c. Summary of Legal Argument.

Alienage is a suspect class and, if limitations are placed upon a person because of his or her status as an alien, this classification must be viewed with strict scrutiny. Given the job of a probation officer as described in this brief and the parties' briefs, combined with the defendants' argument, no compelling state interest has been shown which could justify making citizenship an employment requirement.

If a job is one which goes to "the heart of representative government" then only a rational basis for requiring citizenship need be shown. The job of probation officer does not go to the heart of representative government any more than that of an engineer, a classified civil servant, a lawyer, or persons applying for educational benefits or fishing licenses. There is no rational basis for such a requirement.

For the reasons stated applicant asks leave to file an Amicus Curiae Brief.

Respectfully submitted,

ROBERT NEWMAN,
Attorney for Amicus Curiae.

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Appellees.

AMICUS CURIAE BRIEF.

ARGUMENT.

I.

REQUIRING PROBATION OFFICERS TO BE CITIZENS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

a. Background.

To understand the significance of the myriad of indiscriminate and overly broad statutes requiring citizenship for employment, one must first recognize that California has a long and undistinguished history of discrimination. For

example, the zoning ordinance found unconstitutional in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), was a thinly disguised attempt to prevent Asians from establishing businesses. In *Takahasi v. Fish and Game Comm'n.*, 334 U.S. 410 (1948), the Court struck down a California law which prevented aliens from holding fishing licenses. That same year, the California Alien Land Act, which made it illegal for an alien to own or lease land, also was found to be unconstitutional. *Oyama v. California*, 332 U.S. 633 (1948). As late as 1970, the California Supreme Court struck down a portion of the state constitution as inconsistent with the Fourteenth Amendment because it required English literacy tests in order to vote. *Castro v. California*, 2 Cal. 3d 223 (1970).

Even today the state and county seek to enforce an arbitrary but far-reaching collection of statutes which prevent lawful residents from gainful employment simply because they were born in another country. The confusion in enforcement is illustrated by the unexplained decision of the state to ignore a statutory requirement of citizenship for Highway Patrol Officers.[3]

The state has continued this arbitrary and inconsistent enforcement even though in 1970, California Attorney General Thomas Lynch issued an opinion stating that §1031 was unconstitutional. 53 Ops. Cal. Att'y Gen. 63 (1970).

b. There Is No Compelling State Interest Which Requires Probation Officers to Be Citizens of the United States.

In *Graham v. Richardson*, 403 U.S. 365, 372 (1971), the Court found that classifications based on alienage are "inherently suspect and subject to close judicial scrutiny."

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[3]Although officers of the California Highway Patrol supposedly must be citizens, Cal. Penal Code §830.2(a), the State Personnel Board is advertising in Mexico in a search for Latino recruits for the Highway Patrol. Brafford, *CHP "Help Wanted" Ad Runs in Tijuana*, San Diego Union, July 11, 1981, p. 1.

Subsequently, based upon this doctrine, the Court held invalid laws which made it illegal for aliens to: work in a state classified civil service position, *Sugarman v. Dougall*, 413 U.S. 634 (1973); practice law, *In re Griffiths, supra;* work as an engineer, *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976); or receive state educational benefits, *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

In *Ambach v. Norwick*, 441 U.S. 68 (1979), and *Foley v. Connelie*, 435 U.S. 291 (1978), this Court held that an exception for teachers and police officers was created in *Sugarman, supra:* upon showing that an occupation goes to the "heart of the representative government," a state need only show a rational basis for its action. The job of a probation officer does not come within such an exception.

In 1978 Proposition 13 was passed in California. As a result of this tax law, substantial monies were lost to the government treasuries. Funds for probation officers' supervision of convicted felons and juveniles were greatly reduced.

In addition to financial constraints, the increased crime rate has led to a dramatic increase in probation officer caseloads.[4]

During this time there has been no corresponding increase in the number of probation officers. The increase in crime, the decrease in funding, and the static number of employees all directly affect the average probation officer's responsibilities. In Los Angeles County, for example, the Board of

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[4]The number of felony arrests increased from 170,980 in 1979 to 189,303 in 1980. The number of complaints actually filed increased from 129,322 to 141,321. Likewise, incarcerations grew from 8,838 to 10,311. Those receiving either probation or probation with jail correspondingly swelled from 22,425 to 24,767. *Disposition of Adult Felony Arrests*, California Department of Justice, Bureau of Criminal Statistics (1980).

Supervisors has demanded that probation officers increase their caseloads from 150 to 300 for adult probationers and from 75 to 100 for juveniles while federal guidelines recommend a caseload of no more than 50 for adults and 33 for juveniles.[5]

An increased caseload further reduces the proportion of time officers can spend with probationers. The traditional obligation of a probation officer has been supervision of those on probation. Currently, however, most of an officer's time is spent on nonsupervisory work[6] such as investigation, personnel interviews, paper work, travel, court hearings, and telephone discussions.[7] This happens to a large extent because the terms and conditions of probations are set by the court and then implemented by the officer.[8]

Parole officers' duties are essentially the same throughout state and federal systems. *Critical Issues in Adult Probation: Issues in Probation Management*, U.S. Dept. of Justice,

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[5]Wallace and Neal, *Probation Officers Warned: Return to Work or Lose Job*, L.A. Times, July 2, 1981, Part II at 1. The federal recommended caseload size was developed after time and motion studies discussed in the articles cited by appellants/defendants. *See also Correction*, The National Advisory Commission on Criminal Justice, Standards and Goals (1973).

[6]*Probation and Parole Activities Need to Be Better Managed*, Comptroller General's Report to the Congress, Washington, D.C.: U.S. Government Printing Office, pp. 12-14 (1977). This report is cited with approval in the materials relied upon by appellants/defendants in their opening brief.

[7]*Critical Issues in Adult Probation: Issues in Probation Management*, U.S. Department of Justice, LEAA, pp. 311-314 (1979). *See also Probation Time Study*, Federal Judicial Center (1973); *Probation Time Study*, Administrative Office of the United States Courts, Division of Probation (1975).

[8]*Critical Issues in Adult Probation: Issues in Probation Management*, U.S. Department of Justice, LEAA, p. 417 (1979). The American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals recommend that conditions of probation be solely the obligation of the sentencing judge. The American Correctional Association seems to recommend that probation officers should be given more responsibility in this area.

LEAA, pp. 311-337 (1979). It is noteworthy that the major problems officers encounter are the same, namely that caseloads are so high that little time can be spent with probationers.

The major complaint expressed by a New York probation officer is representative: probation officers have inadequate time to properly supervise their charges.[9] With a caseload of 160 probationers, a probation officer, if he or she has no other duties (including answering the telephone), can spend at most 15 minutes per week with each probationer. Similarly, in a time study conducted in Connecticut, the average probation officer (with a caseload of only 112 probationers) had .8 personal contacts and .7 telephone contacts with each client per month.[10]

Because of the many constraints, the role of probation officer is far more akin to that of a lawyer, a classified civil servant, an engineer, or a fishing license applicant than to that of a teacher or a police officer. A probation officer, like the lawyer or engineer, deals only with a limited class of people.

Teachers and police officers have daily, almost continual contact with a broad spectrum of the public. Teachers not only deal with the students, but with their parents, the public, and other educators. Police officers are highly visible enforcers of public policy as well as of public laws. They have been a traditional representative of government, as have teachers, from early history to modern times.

The position of probation officer, on the other hand, is a relatively new creation designed specifically to deal with

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[9]Harper, *Getting Tough V: Probation—An Impossible Overload.* Assoc. Press, May 6, 1981.

[10]*Critical Issues in Adult Probation: Issues in Probation Management,* U.S. Department of Justice, LEAA, p. 88 (1979).

a limited, partially segregated group whose parameters of supervision are defined judicially. There is neither day-to-day contact with the public nor is there a history of probation officers set forth as representatives of the American way of life such as is the case for teachers and police officers.

While probation officers might well be involved in arrests and rehabilitation, as described in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Fare v. Michael C.*, 442 U.S. 707 (1979), these duties are limited to an extremely small group, 24,767 probationers in 1980 (see footnote 4) out of a population of 23,688,562 in California in 1980.[11] The position of probation officer simply does not involve the same obligations, responsibilities, or image as a police officer or a teacher.

To carry out the duties of a probation officer described in this brief and in defendants' brief, a person need not be a citizen. In fact resident alien members of Amicus Curiae union have been working as probation officers with no problems created by their lack of citizenship. In the instant case, Mr. Chavez-Salido was applying for the job of Deputy Probation Officer—Spanish speaking.

As in *Sugarman v. Dougall, supra*, this statute is "neither narrowly confined nor precise in its application." The dictates of the citizenship requirement "may apply to the 'sanitation man, class B' . . . to the typist, and to the office worker, as well as to the person who directly participates in the formulation and execution of policy." *Id.* at 634. Similarly to *Sugarman*, "The citizenship requirement sweeps indiscriminately." *Id.* at 634.

While the position of probation officer is an important one, it is not a "state elective or important non-elective

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[11] *California State Data Center Report* (unpublished), California State Dept. of Health (April 8, 1981).

executive, legislative, or judicial position." Nor do probation officers "participate directly in the formulation, execution, or review of broad public policy [or] perform functions that go to the heart of representative government." *Id.* at 647. Finally, this simply is not a job "where citizenship bears some rational relationship to the special demands of the particular position." *Id.* at 647.

Unlike the situation in *Ambach v. Norwick, supra* at 69, where the New York statute only excluded those who "have rejected the open invitation" and did not apply for citizenship, the California statute excludes all who are not citizens. As a result, it affects large numbers of people. There are 1,440,491 resident aliens in the State of California. Of them, 1,261,069 are permanent residents.[12] If this statute is enforced in its entirety, a substantial number of people will be foreclosed from public office simply because of their status as aliens.[13]

"Discrimination or segregation for its own sake is not, of course, a constitutionally permissible purpose." *In re Griffiths, supra* at 722, fn 8. The state's purpose must be "[c]onstitutionally permissible and substantial and . . . its use of the classification 'necessary to the accomplishment' of its purpose." *Id.* at 722.

There is no need for a probation officer to be a citizen; the functions of the position do not embrace a necessity to encroach upon a lawful resident's employment simply be-

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[12]According to the *1980 Annual Report of the Immigration and Naturalization Service*, Dept. of Justice, there were 519,742 permanent residents from Mexico, 99,099 from the Philippines, 62,735 from Canada, and 62,412 from the United Kingdom. Many permanent residents also emigrated from Vietnam, Portugal, Taiwan, Korea, Japan, El Salvador, Cuba, and China.

[13]In California, 1,444,400 people work for state or local government entities. Another 322,200 work for the federal government. *California Economic Indicators*, p. 3 (May 1981).

cause that person is an alien. The job of a probation officer is like that of a lawyer, an engineer, or a civil servant. They have a reasonable amount of discretion while working within the instructions of their employer. Similarly, lawyers, engineers, civil servants, and probation officers work with limited groups. There is, as required in *Foley v. Connelie, supra* at 298-299, "no broad power over people generally."

The job of probation officer does not go to the "heart of representative government." Because of this, the state must show a compelling state interest in order to uphold this statute. They have not shown such an interest. The decision of the lower court should be affirmed.

c. There Is No Rational Basis for Requiring Citizenship.

If the state can show that a position goes "to the heart of representative government," then it need only show a rational basis for a citizenship requirement. *Ambach v. Norwick, supra* at 76; *Sugarman v. Dougall, supra* at 647.

As described above, as well as in Plaintiffs' and Defendants' briefs, officers work in a service profession designed to meet the needs of a small, well-defined group. The job requires skill and expertise. These officers justifiably have great pride in their work. Their functions, however, are clearly delimited and, as noted above, they exercise no "broad power over people generally." *Foley v. Conellie, supra* at 298-299.

The job of a deputy probation officer requires working with a small, isolated group of people.[14] Even within this group, the contacts are minimal. A requirement of citizen-

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[14] "In summary, if we ask how probation officers actually spend their time, we find that they are most frequently in their offices, alone, occupied with paperwork." *Critical Issues in Adult Probation: Summary*, U.S. Department of Justice, LEAA, p. 82 (1979).

ship in this situation amounts to the same discrimination decried in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). The state is simply enacting a barrier to employment based on a person's racial and ethnic status.

Members of Amicus Curiae union are currently holding probation officers positions. Some of them are resident aliens. Their citizenship makes no functional or symbolic difference.[15] They perform their jobs equally well with or without citizenship papers and, further, the lack of citizenship has no impact upon either the public in general or probationers in particular. There is no rational basis for a requirement of citizenship to be a probation officer.

Conclusion.

There is no compelling state interest or rational basis which can uphold these statutes. The three-judge panel's decision should be affirmed.

Respectfully submitted,

ROBERT NEWMAN,

Attorney for Amicus Curiae.

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[15]Under California Constitution Article XX, Section 3, all public employees must take a loyalty oath which includes an agreement to support and defend the Federal and State Constitutions.